IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1586

ROGERS BROTHERS WHOLESALERS,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

AUTHORITIES

TEXTS

RULES

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on February 13, 1976.

CITATIONS TO OPINION BELOW

The decision and order of the National Labor Relations Board adopting the decision of the Administrative Law Judge of date June 2, 1975, is printed as Appendix "A", attached to which is an order correcting the decision and order dated July 15, 1975. The opinion of the Court of Appeals which affirmed the decision of the National Labor Relations Board, is printed as Appendix "B" hereto.

The opinion of the Court of Appeals on rehearing is printed as Appendix "C" hereto. It is dated March 29, 1976.

The judgment of the Court of Appeals is dated February 13, 1976, and is printed as Appendix "D". Petitioner's petition for rehearing was filed in due and legal time and is Appendix "E", and was denied on March 15, 1976, see Appendix "F", affixed hereto. The Court of Appeals' stayed its mandate to and including April 29, 1976, as shown by Appendix "G".

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254(1) and Rule 19, of this, the Supreme Court, subd. 1(b), providing the Court will consider "important question of Federal law which has not been, but should be, settled by this Court; * * * or has decided a Federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision."

THE QUESTIONS PRESENTED

1.

Did the Court of Appeals err in accepting as substantial evidence, evidence which raised only a presumption, and that evidence was denied and thereby wiped out the presumption leaving no evidence of violation.

2.

Did the Court of Appeals err in approving the N.L.R.B.'s decision which approved the Law Judge's ruling allowing the General Counsel for the N.L.R.B. to amend his petition on the day of trial adding paragraphs 8, 9, 10, 11 and 12, which covered matters which had been settled by settlement agreement and then allowing the G.C. on date of trial to produce evidence antedating the settlement agreement in order to show company animus?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The most pertinent constitutional provision involved is the Fourteenth Amendment, due process of law, which petitioner was denied.

The only Statute involved is that which is known as the Labor Management Relations Act, Title 29, Section 160(e), which, in pertinent part, provides, "The findings of the Board with respect to questions of fact *if supported by substantial evidence* on the record considered as a whole shall be conclusive.", and whether a presumption which has been rebutted and wiped out constitutes "substantial evidence" to support the N.L.R.B. judgment and the Circuit Court's judgment.

STATEMENT

Union organization efforts were undertaken in Rogers Brothers Wholesalers place of business which was a business which manufactured expensive eye glasses and eye wear, in Beaumont, Texas. Petitioner

first learned about these activities about March 5, 1974, and as usual some employees were for and some were against the organization of a union. As a result of some of the activities a settlement agreement was entered into on the 28th day of May, 1974, and petitioner posted in accordance with the agreement, the agreed upon poster and all matters complained of were thereby put at rest and this settlement agreement was under the direction of Judge Johnson who was hearing the matter. Thereafter, the election was duly had and the vote was approximately 33-1/3 for union and 66-2/3 against the union.

On or about June 5, 1974, petitioner, because of the obstreperous conduct of Aaron Cole, and his consistent violation of the "No Talking" rule, which had been invoked, and which was a rule of long standing, and so found to be by the Administrative Law Judge, was again reiterated but nevertheless, Cole disregarded it. Cole had a very unfavorable record, he was tardy, he was foul-mouthed, late in returning from coffee breaks, talked with other employees while they were working, and his performance as a workman was low in production and high in breakage of expensive eye-wear. Because of his production and attitude it was thought retraining might help him, but he refused it. By Cole's own testimony he was counseled with nearly every other day. When he failed and refused to comply with the "No Talking" rule he was discharged. He brought proceedings of unfair labor practice, which was one of the subjects of this proceeding.

Another employee, Marie Cash, while at a coffee break, sitting at a table by herself, without having

been addressed by another employee, nevertheless, called the other employee "coon-ass trash". The other employee left, and as she walked through the door, without saying anything, Marie Cash called after her, "Go tell, you bitch".

Thereafter, some other employees accosted Marie Cash and remonstrated with her vigorously, there was general commotion, almost face-slapping and hair-pulling, the supervisor was notified; he summoned Marie Cash and the employee whom Marie Cash had referred to as "coon-ass trash" and at that conference Marie Cash admitted that she had called the other employee a "coon-ass." The Supervisor told Marie Cash that he would have to suspend her until he could investigate and that he would call her.

Thereupon, Marie Cash turned on her heels and said "Don't bother". This statement by Marie Cash was accepted at face value, she was not called, and after the election filed an unfair labor practice charge saying that she was fired, as a result of an unfair labor practice.

The Administrative Law Judge's opinion and findings clearly demonstrate Aaron Cole was, and was found to be, an obstreperous employee, of low production, high breakage, foul-mouthed, late, belligerent; had refused retraining; but nevertheless, the Administrative Law Judge found that his discharge was the result of Cole's violation of the "No Talking" rule which he found to be a valid rule, but he also found that the "No Talking rule" was discriminatorily enforced because there was evidence of two (2) incidents occurring near supervisors who took no corrective ac-

tion. The supervisors denied knowledge of the incidents which allegedly occurred near them in the midst of people and operating machines. Thus, the presumption that the supervisor condoned the talking was rebutted and the presumption was wiped out, leaving no evidence of discriminatory enforcement. The Law Judge also found that Marie Cash was unjustly discharged, because, he held, she should have been called by the supervisor after the investigation, and that Marie Cash's statement "Don't bother" to call her, was made by her in haste and anger, and she could not be charged with the results of her own language, and that she was entitled to be reinstated with back pay and so was Aaron Cole.

More details are set out in the petitioner's motion for rehearing attached hereto as Appendix "E".

ADMINISTRATIVE LAW JUDGE'S FINDINGS AND OPINION

Judge Johnson heard the settlement agreement proceedings and approved and entered the settlement agreement, which was fully complied with, was moved by the general counsel to set it aside but Judge Johnson overruled the motion. On the day of trial G.C. moved to amend his complaint by adding paragraphs 8, 9, 10, 11 and 12, which paragraphs embraced all of the items that had been covered by the settlement agreement which Judge Johnson had refused to set aside. Objection was made but Judge Weil permitted the amendments; however, he ruled that evidence introduced thereunder would be considered only to show company animus and would not be considered on the

question of whether the alleged unfair labor practice violations had occurred.

The evidence regarding the unfair labor practice and the discharge of Aaron Cole and Marie Cash is a very small part of the record. Most of the record, hundreds of pages of it, is taken up with the alleged violations that were put at rest by the settlement agreement approved by Judge Johnson.

N.L.R.B.'S OPINION AND JUDGMENT

The National Labor Relations Board adopted Judge Weil's findings and opinions with only a very minor variation from which ruling of the Board the National Labor Relations Board then filed with the Court of Appeals, application for enforcement to which petitioner responded in full with brief and after the judgment was entered with a motion for rehearing, which was overruled.

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

The Court of Appeals put the case on summary docket and summarily affirmed the N.L.R.B.'s judgment and findings, thereby holding that the presumption of knowledge of other employees violation of the "No Talking" rule constituted substantial evidence even though this presumption was rebutted by denial by the supervisors of knowledge of the only two (2) incidents reflected by the record.

REASONS FOR GRANTING THE WRIT

The record is voluminous; comprising more than five hundred (500) pages of testimony. However, the testimony with reference to the alleged violations is comparatively minimal. The violation was arrived at by Judge Weil in his findings and opinion by finding as a fact, that there was a "No Talking Rule", that it was of long standing, and that it had recently been reiterated and to this point therefore, petitioners had just cause for discharging Aaron Cole for violating it. Judge Weil found Cole violated the rule. However, Judge Weil further found that the "No Talking Rule" was discriminatorily enforced in that, he said, it was not enforced as against other employees.

The only evidence about other employees talking is that which is set forth by the general counsel in his brief in the Court of Appeals, page 4, thereof, in one (1) paragraph which paragraph reads as follows:

> "On June 4, Rogers made a speech to the employees, in which he advised them to concentrate on their work, build up production and cut down on errors and breakage (A. 13; Tr. 30-31, 305-307, 311). Rogers announced that the employees would not be permitted to talk during working hours (ibid).[4] Despite this announcement several anti-union employees carried on conversation during work time without supervisory interference (A. 13; Tr. 307-308, 311-312.) Employees Billy Ashworth and Julia Stewart, both of whom were wearing 'non-union badges', discussed the union while standing less than two (2) feet from supervisor

> Blackie Boutte (Tr. 312-313); and Ernestine Alfaro conversed with Pat Crews and gave her a badge while in the presence of supervisor Fredieu (Tr. 307-308)."

That same statement quoted above was reiterated in a little different language in the first paragraph on page 9 of G.C.'s brief.

Note that the only evidence the G.C. could bring forth was evidence that Billy Ashworth and Julia Stewart discussed union while standing less than two (2') feet from supervisor Blackie Boutte, and Ernestine Alfaro conversed with Pat Crews and gave her a badge while in the presence of supervisor Fredieu.

The witness who testified regarding the Ashworth-Stewart alleged conversation stated that she heard only one (1) word — that is, the word "union", she heard no further conversation, (Tr. 312, L. 21-22) she could not testify as to what was said and did not know what was said, but said that the alleged conversation was near supervisor Boutte. He denied hearing the conversation. (Tr. 527, L. 21 to L. 1, p. 528).

The witness who testified about the Alfaro-Crews instance testified that Alfaro gave Crews a badge, she did not know what was on the badge, (Tr. 307, L. 20-21) and therefore, did not know whether it was a union badge or a non-union badge, or whether it was the regular badge that all employees were required to wear for identification purposes. This conversation is supposed to have been near supervisor Fredieu who denied knowledge of it (Tr. 532, L. 18-23) and denied the girls exchanged badges. (Tr. 532, L. 25 to L. 1, p. 533).

The fact that these two (2) instances are supposed to have taken place near these supervisors is not proof of anything in view of the fact that each supervisor testified that they were not aware of such instances, nor what was said nor of any transferring of badges.

Since the two instances are alleged to have taken place near the supervisors, there is a presumption at most, only a presumption, that the supervisors were aware of the instances. These presumptions, like all presumptions, however, went out of the case when the supervisors denied any knowledge of the instances, and therefore, there is no evidence of discriminatory enforcement of the "No Talking" rule.

It is not a question of whether there is substantial evidence; there is just no evidence, and the Circuit Court by its summary affirmance has affirmed the reinstatement of Cole with back pay, *on no evidence* and this constitutes a denial of due process of law to these petitioners, and a complete reversal of all law on the effectiveness of a presumption which has been rebutted.

Substantial evidence means nothing more than it "must be enough to justify, if the trial were to a jury, a refusal to direct the verdict when the conclusion sought to be drawn from it is one of fact for the jury." FOOT BROTHERS GEAR & MACHINE CORPORATION v N.L.R.B., 114 F(2) 611 (7th Cir. 1940) rev., 61 S.Ct. 318, 311 U.S. 620, 857 L.Ed. 394, mandate conformed to 121 F(2) 802, in which the Circuit Court affirmed its previous holdings. The Court cited many cases in support of this statement of the Rule.

A presumption may carry a case to the jury, if unrebutted, but when it is rebutted, then it is wiped out and it is the same as if the presumption had never been raised. There literally is no evidence.

The rule is stated in MC CORMICK & RAY ON EVIDENCE, 2nd Edition, Vol. 1, Sec. 53, page 62, in discussing the various views of the effect of presumptions, as follows:

> "However, the most widely accepted is the one advocated by Thayer — namely, that when fact 'A' is established the jury must find fact 'B' unless the opponent introduces evidence from which a jury could reasonably find that 'B' did not exist. Or to put it as most Courts do, the presumption places upon the party against whom it operates the burden of producing evidence sufficient to justify finding of the non-existence of the presumed fact. This view was adopted by the American Law Institute in its model Code of Evidence, and is the established rule in Texas. It has the distinct merit of being easily understood and easily applied during the trial of the case. Under this rule where the opponent produces sufficient evidence to justify a finding against the presumed fact, the presumption vanishes and the situation is the same as it would have been had no presumption been created."

Thus, when the two supervisors denied any knowledge of the alleged conversations or incidents, the presumption was wiped out and it was then the

burden of G.C. to proceed with further evidence which he did not do.

Thus, there is *no* evidence of discriminatory application of the "No Talking" rule. Thus, there is no evidence of a violation. There being no evidence of a violation, there is no basis for a finding of discriminatory enforcement of the "No Talking" rule. The hundreds of pages of testimony having to do with the settlement agreement become immaterial and should not have ever been allowed in the case in the first place because Judge Weil should not have permitted the general counsel to amend his complaint and add paragraphs 8, 9, 10, 11 and 12, on the day of trial which only burdened the record with immaterial evidence.

Thus, petitioner was denied due process of law because they have been cast in judgment on a ruling that has no basis in fact to support it, and the statutory requirement that the judgment be supported by substantial evidence has been construed to be satisfied by a presumption which has been wiped out by controverted evidence.

Thus, the alleged conversation where the one word "union", was allegedly heard by the witness, but no other part of the conversation was heard, and the incident where one employee gave another employee a badge with no one knowing what was on the badge, has been accepted by the Circuit Court as sufficient evidence of discriminatory enforcement of the "No Talking" rule, even though the supervisors denied having heard or seen the incidents. The denial under the Rule of Law above stated, destroyed the presumption and "The presumption vanishes and the situation is the same as it would have been had no presumption been created." Therefore, there was no evidence upon which the Circuit Court could affirm the Board's findings and judgment.

THE MARIE CASH INCIDENT

Marie Cash was suspended because without provocation she called another female employee a "coon-ass" and a "coon-ass trash". When summoned by the supervisor she admitted her misconduct which was complete violation of clear and specific printed rules of conduct by which the employees should conduct themselves as "ladies and gentlemen", page 7 of the Rules, and when she was informed that she would be suspended until there could be an investigation, and she would be called, she turned on her heels and said "Don't bother".

To wipe out this clear and explicit instruction by the employee to not bother to "call her", the Board adopted the findings of Judge Weil which were that this statement by the employee was made in her "anger and dismay" and that she ought to be reinstated with back pay. Petitioners respectfully submit that the reasoning by Judge Weil, adopted by the N.L.R.B. and affirmed by the Circuit Court is nothing more than Judge Weil thinking up an excuse for the employee's failure to call her employer and inquire as to the outcome of the investigation and whether she could return to work. In her anger and dismay, she still had several weeks of time to calm down and call her employer, but instead of doing that, several weeks

later went to Houston and filed a charge of unfair labor practice. This is wholly unjustified, and there is no evidence of unfair labor practice in this incident and the employer should not be saddled with a foul-mouthed employee's "anger and dismay", as excusing her conduct and refusing to make an inquiry even if she were upset. She could have called her employer. This finding by the Court and by the Board is no evidence and should be set aside.

The United States Supreme Court in ADLER v BOARD OF EDUCATION, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517, 27 ALR(2) 472, in discussing presumptions and their effect at page 478 of its opinion, ruled:

> "The presumption growing out of a prima facie case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears and unless met by further proof there is nothing to justify a finding based solely upon it."

This holding by the Supreme Court is in line with the rule quoted from MC CORMICK & RAY ON EVIDENCE, supra, and is the general rule. The presumption arising from the supervisors being near or in the vicinity of the persons who are supposed to have violated the "No Talking Rule" without being reprimanded by the supervisors completely disappeared when the supervisors testified that they had no knowledge of such conversation and that the girls did not exchange badges.

Thus, there was no evidence upon which to base the judgment of the N.L.R.B., nor the judgment of the Court of Appeals, in affirming the judgment of the Board and to cast these petitioners in judgment on a rebutted presumption, is to deny them due process of law.

Such construction of the statute that requires the N.L.R.B.'s findings be based upon substantial evidence is made a mockery when the substantial evidence consists of nothing but a rebutted presumption. In this case there is no substantial evidence — there is no evidence.

The Court of Appeals completely misinterpreted the statutory requirement of "substantial evidence" and has interpreted that statute and that requirement to be satisfied by a rebutted presumption. The Circuit Court not only misconstrued the meaning of "substantial evidence" but also misapplies it and has actually destroyed the Statute and the proper and legal interpretation of "substantial evidence."

CONCLUSION

Petitioners respectfully submit that this petition for writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit, that the Circuit Court's judgment be reversed, that enforcement be denied, and in the alternative that the judgment be reversed and this cause remanded for such further proceedings as are proper, that these petitioners not be required to reinstate Aaron Cole, with back pay, nor to reinstate Marie Cash with back pay and for such other and

further relief to which petitioners may be justly entitled, either in law or equity, special or general.

Respectfully submitted,

GILBERT T. ADAMS
GOODHUE BUILDING
BEAUMONT, TEXAS 77701
COUNSEL FOR PETITIONERS

CERTIFICATE

Petitioners certify that the requisite number of copies of this petition (40) have been this day forwarded by United States Mail to the Clerk of the Supreme Court of the United States, Supreme Court Building, Washington, D.C.; and three (3) copies thereof have been mailed to Acting General Counsel, ATTENTION: Allen D. Cirker and Jane P. Schlaifer, National Labor Relations Board, Washington, D.C., 20570; and one (1) copy to the Honorable Louis V. Baldovin, Director, Region 23, N.L.R.B., Dallas-Brazos Building, Fourth Floor, 1125 Brazos Street, Houston, Texas, and a copy has been mailed to the Oil, Chemical & Atomic Workers Union and its Local 4-243, 2490 South Eleventh Street, Beaumont, Texas, 77701, ATTENTION: Mr. Ray West, all having been mailed in the United States mail with proper and adequate postage paid and properly sealed on this the ____ day of April, A.D., 1976.

GILBERT T. ADAMS
Attorney for Petitioner

APPENDIX A

JKP
D-9841
218 NLRB No. 19 Beaumont, Tex.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

ROGERS BROTHERS WHOLESALERS

and Cases 23-CA-5143 and
23-CA-5143-2

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION AND ITS LOCAL 4-243, AFL-CIO

DECISION AND ORDER

On January 17, 1975, Administrative Law Judge Paul E. Weil issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief and the General Counsel filed exceptions with a brief in support thereof and an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision[1] in light of the exceptions and briefs[2] and has decided to affirm the rulings, findings,[3] and conclusions[4] of the Administrative Law Judge and to adopt his recommended Order as modified herein.[5]

---

1 We note the following inadvertent errors in the attached Decision which, however, do not affect the conclusions reached: In sec. III, third paragraph, the consent election was to be held on June 25, 1974, not 1975, and in the portion of sec. III captioned "The Discharge of Aaron Cole," seventh paragraph, fourth sentence, the date of the "Individual Personnel Record" was 6/5/74, not 6/5/71.

2 Respondent, in its exceptions to the attached Decision, cited the Texas Penal Code and included a newspaper clipping which it claims supports its position that Marie Cash used improper language calculated to disturb the other employees. The General Counsel argues that neither of these was entered into evidence during the hearing and they should be disregarded by the Board. These matters are not properly made a part of the record herein, and, furthermore, they would add nothing to the record which would assist us in reaching our decision.

3 The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

We do not adopt or rely upon sec. III, fourth paragraph, of the Administrative Law Judge's Decision insofar as it refers to "the customary 'spontaneous' formation" of an antiunion employee committee, thus implying that its origins were of doubtful validity. There is no evidence to support this possibility and no issue as to the legality of the committee or its activities.

4 In the absence of exceptions thereto, we adopt, *pro forma*, the Administrative Law Judge's recommendation to dismiss the complaint insofar as it alleged that the Respondent violated the Act by discharging Rejenia Cagle.

5 The Administrative Law Judge found, and we agree, that the Respondent discriminatorily enforced a no-solicitation rule, thereby violating Sec. 8(a)(1) of the Act, and we find merit in the General Counsel's exception to the failure to provide a specific and adequate remedy for this violation. Accordingly, we shall modify the Order as requested. Further, in the absence of exceptions thereto, we adopt *pro forma* the Administrative Law Judge's failure to find that the rule against employees' talking during working hours was an unlawfully broad no-solicitation rule. In addition, we find that a broad order is appropriate in view of the serious nature of the violations found herein. Therefore, we shall also modify the Order in this respect.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Rogers Brothers Wholesalers, Beaumont, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as herein modified:

1. Delete paragraph 1(b) and add the following paragraphs 1(b) and (c):

"(b) Discriminatorily enforcing any no-solicitation rule by prohibiting union solicitations on working time while permitting employees to solicit and talk against a union on working time.

"(c) In any other manner interfering with, restraining, or coercing their employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or to refrain from any or all such activities."

2. Substitute the attached notice for the Administrative Law Judge's notice.

Dated, Washington, D.C. JUN. 2, 1975

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

John A. Penello, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

D-9841

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice and to keep our word about what we say in this notice.

The Act gives all employees these rights:

To engage in self-organization
To form, join, or help unions
To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other mutual aid or protection
To refrain from any and all these things.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT discourage membership in Oil, Chemical and Atomic Workers International Union and its Local 4-243, AFL-CIO, or any other labor organization, by discriminatorily discharging or suspending any employee because of his activities on behalf of said labor organization.

WE WILL NOT discriminatorily enforce any no-solicitation rule by prohibiting union solicitations on working time while permitting employees to solicit and talk against a union on working time.

WE WILL reinstate Aaron Cole and Marie Cash to the jobs they formerly held or, if these jobs no longer exist, to substantially equivalent jobs and WE WILL make them whole for any loss of pay they may have suffered as a result of our discrimination against them by payment to them of the amount of money they lost as a result of our action.

ROGERS BROTHERS
WHOLESALERS
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One Allen Center, 500 Dallas Avenue, Suite 920, Houston, Texas 77002, Telephone 713-226-4296.

JD-17-75
Beaumont, Tex.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

ROGERS BROTHERS WHOLESALERS

and Cases No. 23-CA-5143
23-CA-5143-2

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION AND ITS LOCAL 4-243, AFL-CIO

Frank L. Carrabba, Esq., of Houston, Tex., for the General Counsel.
Mr. Ray T. West, of Beaumont, Tex., for the Charging Party.
Gilbert T. Adams, Esq., and *Raymond W. Brassard, Esq.*; *Adams and Brown*, of Beaumont, Tex., and *C. M. Bradford, Esq.*, of Beaumont, Tex., for the Respondent.

DECISION

Statement of the Case

PAUL E. WEIL, Administrative Law Judge: On June 11, 1974, Oil, Chemical and Atomic Workers International Union and its Local 4-243, AFL-CIO, hereinafter called the Union, filed a charge alleging that Rogers Brothers Wholesalers, hereinafter called Respondent, violated Section 8(a)(3) and (4) by the termination of four named employees and by that and by other acts and conduct violated Section 8(a)(1) of the Act. On June 17, 1974, the Union filed a second charge alleging an additional violation of 8(a)(3) by the discharge of a fifth employee. On August 22, 1974, the Regional Director for Region 23 of the National Labor Relations Board, hereinafter called the Board, on behalf of the General Counsel issued an order consolidating the two cases and a complaint and notice of hearing which alleges the discriminatory discharge of three employees, Aaron Cole, Rejenia Cagle and Marie Cash as well as four incidents of alleged violation of Section 8(a)(1) of the Act. At the same time counsel for the General Counsel moved Administrative Law Judge Thomas D. Johnston to set aside a settlement agreement entered into on May 28, 1974 in Cases No. 23-CA-5009 and 23-CA-5059 and represented therein that upon the granting of the motion the complaints in those cases would be consolidated with the complaint in the instant cases. Judge Johnston denied the General Counsel's motion to set the settlement agreement aside and the General Counsel issued an amended complaint alleging as background the allegations in the earlier complaint which gave rise to the settlement before Judge

Johnston. Respondent duly answered the amended complaint, as it had duly answered the original complaint. In its answer Respondent denied the allegations of postsettlement activity and raised the settlement agreement as a bar to litigation of the matters covered by the settlement agreement. On the issues thus joined the matter came on for hearing before me on October 15, 1974, at Beaumont, Texas. At the opening of the hearing Respondent moved to strike the allegations of past conduct which had been resolved by the settlement agreement; this motion was denied. The General Counsel thereupon moved to amend the complaint by the addition of certain allegations of independent violations of Section 8(a)(1) which motion was granted. The hearing proceeded through October 18, 1974, on which date it was closed. All parties were present, Respondent and the General Counsel were represented by counsel, all parties had an opportunity to call and examine witnesses and to adduce relevant and material evidence. At the close of the hearing all parties waived oral argument, briefs have been received from the General Counsel and Respondent.

Upon the entire record herein and in consideration of the briefs, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent is a partnership composed of Victor J. Rogers, N. J. Rogers, S. J. Rogers and Ben J. Rogers, doing business as Rogers Brothers Wholesalers at Beaumont, Texas, where it is engaged in the manu-

facture of prescription lenses and related eyeware items at its wholesale optical laboratory. Respondent annually purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Texas and is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

III. The Unfair Labor Practices

Background

Respondent operates its optical laboratory in several buildings located in downtown Beaumont, Texas, where it employs approximately 350 men and women manufacturing and assembling eye glasses and shipping them to their customers around the country. The enterprise is directed by Victor Rogers, apparently the only one of the partners immediately engaged in the business.

In early February[1] the Union commenced a campaign to organize the employees with a meeting for employees. Organizing then proceeded by the usual channels, handbilling the employees at the entrance to the buildings in which they worked, passing out buttons and other advertising paraphernalia and

1 All dates hereinafter are in the year 1974 unless otherwise specified.

soliciting employees to sign cards designating the Union as their collective-bargaining representative. Respondent became aware of the union organization in early March and commenced an antiunion campaign of its own, again following the normal course of speeches and personal interviews with employees as well as written material in the form of a letter.

The Union filed charges alleging violations of Section 8(a)(1) by the Employer which came on for hearing and on May 28, 1974, before Judge Johnston, the parties entered into an informal settlement agreement. On May 31 a petition for an election filed by the Union came on for hearing and the parties agreed to a stipulation providing for a consent election to be held on June 25, 1975.

During the 2 weeks immediately preceding the election the customary "spontaneous" formation of an antiunion employee committee took place replete with badges, handbills and plastic straw hats.

During the campaign three overtly prounion employees, Aaron Cole, Rejenia Cagle and Marie Cash were discharged by the Employer. The General Counsel contends that these employees were discharged at least in part because of their union activities. The Respondent contends that each of them was discharged for cause. In addition the General Counsel contends that a no-solicitation rule was promulgated on May 27 and enforced thereafter in a discriminatory fashion in violation of Section 8(a)(1), that certain statements of partner Victor Rogers addressed to employees violated Section 8(a)(1) and that Respondent's supervisors "authorized, ratified, con-

doned and participated in distribution of" leaflets which threatened employees with loss of existing benefits and equated union organization with strikes, violence and loss of present income, all in violation of Section 8(a)(1) of the Act.

The Discharge of Aaron Cole

Aaron Cole commenced his employment with Respondent on June 23, 1969. He was trained to operate a generator which was one of the machines used for grinding lenses. Apparently from the inception of his employment, Mr. Cole was an erratic employee. While he missed very few days of work he was occasionally tardy both in reporting to work in the morning and after coffeebreaks and luncheon breaks. His production was never completely satisfactory and his breakage was high. In addition Mr. Cole was talkative, flippant and occasionally argumentative, none of them qualities particularly prized by Respondent's hierarchy.

Cole was one of the early union adherents and in that capacity early came to the attention of Respondent. He described an occasion on March 11 on which he was called into the office of Supervisor Wiebusch where he was confronted by Victor Rogers in the presence of Foreman Pete Boutte and George Wiebusch. According to Cole's testimony Rogers asked him what he thought of what was going on on the sidewalk. At that time three employees were on the sidewalk in front of the shop getting cards signed for the Union. Cole answered that he guessed that it was okay. Rogers asked why people would want to join the Union and Cole said that it was for more benefits, wages and job security.

Rogers pointed out that the employees had job security, good wage increases and did not need a union and said that he did not think that people wanted a union. Cole answered that they must want the Union because they were signing cards. At this point, according to Cole, Rogers suggested that Cole should try to lead the people back toward the Company instead of against the Union. Cole refused, saying that he was not making enough money. At this point Rogers was called out of the room and Wiebusch pointed out that the Company had been very good to Cole and asked him why he would not lead the people toward the Company instead of against the Company. Cole again answered that he needed more money and better benefits and more job security. At this point Boutte said that he could not understand why Cole had refused to take some job training that the Company had offered him, and Cole stated that he was not paid enough money to warrant his learning another job. Rogers returned to the room and asked Cole again why he would be on the Union's side instead of the Company's side. Cole again answered that he did not make enough money. Rogers pointed out that he was spending a lot of money for employee benefits and if the Union came in he would see whether the Union would pay the benefits, give them security and sick leave. Rogers then asked Cole if he could get the peoples' union cards back for him and Cole answered that he could not, that the people had signed for the Union and that only the people could get them back. Rogers mentioned that a union had tried to get in in 1952 and again in 1973 and failed both times; he pointed out that he expected they would fail again.

Rogers admitted having a conversation with Cole on March 11 but stated that there was no mention of the Union except by Cole and that he, Rogers had told him that Cole was not there to talk about the Union. According to Rogers the sole purpose of the meeting was to "counsel" Cole because he had teased a fellow about his wrinkled clothing, which Rogers considered ungentlemanly conduct. Wiebusch testified that he had very little recollection of the conversation but that nothing was said about the Union and that Rogers called Cole in because he had a complaint from one of his fellow employees that Cole was making fun of him about his clothing being wrinkled. Wiebusch testified to the question "Did anybody initiate a conversation or attempt to initiate a conversation about union activity at that meeting?" with the answer "None that I know of," and denied that he had "on March 11, 1974, instructed the employees to abandon their support of the Union and seek to have their fellow employees do likewise." Pete Boutte testified that he was present at this meeting on March 11. In response to a leading question he said that the matter of the Union was not brought up, that Mr. Cole did try to bring in the Union and Mr. Rogers said "that is not what we are talking about, we are talking about you making fun of fellow employees and it is a shame that you are doing that." Boutte further denied that he, Wiebusch or Rogers went in to the subject of the Union or discussed union activities or organization in any particular.

Respondent produced and placed in evidence Cole's entire personnel file which included 44 pages of written notes by the various supervisors who dealt with Cole, all taken between January 1, 1974 and Cole's

discharge on June 5, 1974. These notes range from comments about Cole's work habits to almost verbatim accounts of "counseling" sessions conducted by various supervisory personnel and in some cases contain two or three notes written by different supervisors about the same incident. It is noteworthy that among the 44 pages of notes, all of which are dated, no mention whatsoever is to be found of the March 11 incident nor is there any mention of a reprimand being given to Cole resulting from his alleged ungentlemanly conduct in remarking about a fellow employee's unpressed clothing. The entries that appear in the many pages of notes are of both lesser and greater triviality than this incident. No explanation was offered as to why no note was made by any of the three members of the hierarchy that confronted Cole on this occasion. Having this factor in mind, considering the fact that the interrogation of Boutte and Wiebusch was largely by excessively leading questions and neither of them purported to give an account of what was said in the meeting and considering also that Cole's account, which was in considerable detail, attributed to Rogers many of the same points and positions made by Rogers in his testimony in other regards and in his letter to the employees, I credit Cole's version.[2]

Cole also testified that about April 17 he had a conversation with C. M. Bradford, Respondent's house counsel, again in the office of Supervisor Wiebusch. Neither Cole's nor Bradford's account of this conversation are very satisfactory. The General Counsel specifically contends that Bradford in this conversa-

2 The General Counsel does not seek any order based on the above conversation but adduced the evidence only to show Respondent's antiunion animus.

tion stated to Cole that if the Union won the election the Company would not bargain. However on cross-examination Cole indicated that in this part of the conversation what Bradford said or obviously meant was that in the event the Union won the election he, Bradford would not do the bargaining for the Company because he was not a labor lawyer. This is consistent with the fact that Bradford did not represent the Company in the instant proceeding or in the prior representation case or unfair labor practice charge proceeding. Similarly the General Counsel contends that a statement allegedly made by Bradford "You can't pick corn in a cotton patch" indicated a warning that the Union could not achieve a raise in pay if they won the election. However on cross-examination Cole testified that Bradford said that he was a different type of lawyer from the lawyer who represented Farah and was not going to negotiate with the Union even if the people would win the election. Cole testified "he was not going to do it, because you can't pick corn in a cotton patch." Clearly Bradford's use of the quoted terminology was expressive of the distinction he was drawing between his own specialty and that of a labor lawyer. Cole also testified that in this conversation Bradford asked on two occasions how many cards the Union had gotten signed. Bradford denies this completely. I make no findings either way. Cole's testimony concerning the interview was too confused to warrant crediting him in this regard over the denial of Bradford.

On June 5, Cole stopped to talk to three of his fellow employees arranging to go bowling after work and then went to the water fountain where Clifford Richard, the foreman over the employees to whom he

had been talking met him and said "Aaron didn't anyone talk to you about going to the back and talking to Marks and help on the job, Cole answered that he had been talked to. Richard then said "well we don't want you back there talking to nobody, you know we just don't want you back there." Cole pointed out to Clifford that he was not a supervisor and had no right to tell him what to do, stating that at the representation proceeding a few days before Rogers had taken the position that Clifford Richard was not a supervisor. Cole went back to his working area and was sent to Wiebusch's office where he was asked what had happened by the water fountain. He told Wiebusch what had happened and Wiebusch, pointing out that he had been talked to before about talking to people on the job, discharged him. An argument ensued and Cole left the plant. Cole's testimony regarding this incident is substantially the same as that of Wiebusch, Richard and Pete Boutte who was present except that Boutte and Wiebusch both testified that Wiebusch mentioned that in the discharge interview that Cole was being discharged among other things for his poor production and high breakage as well as his general attitude.

Various company documents are in evidence relating to Cole's discharge. In his personnel file is a copy of a termination notice addressed to the personnel department seeking a replacement for Cole. The reason for leaving was stated: "Discharged for leaving his work and talking to other employees interrupting their work." On another document entitled "Individual Personnel Record, under date of 6/5/71, is the statement" discharged for going in another work area and talking to other employees while he was supposed to be working." The personnel

file contains a memorandum from Wiebusch, undated, and the only memorandum typed in the personnel file, stating the story substantially as Cole testified but adding that he reminded Cole that he had been talked to several times about disrupting work in other areas, in his own area, and about his low production. "and I told him that since it looked like he just would not cooperate he was being discharged for misconduct." There is no testimony as to when this document was written. Pete Boutte, in his initial affidavit, stated that during the discharge conversation neither Wiebusch nor Boutte mentioned his low production, however he changed his testimony on the witness stand and then, asked to explain, said "In thinking it over later, there is a possibility Mr. Wiebusch may have mentioned production, like I say, I am almost sure he did." Wiebusch testified consistently with his written memorandum that he mentioned production when the discharge was consummated. I do not believe him nor do I believe Boutte's afterthought at the hearing. I conclude and find that Cole was discharged because he was talking to employees during his working time.

After the May 28 abortive hearing at which Respondent signed a settlement agreement Rogers took it on himself to make a speech to the employees explaining that Respondent had not been found guilty of doing anything wrong. It was apparently during this speech that Rogers announced that employees would not be permitted to talk during working hours and told them that they should concentrate on their work, build up production and cut down on errors and breakage. The next day Cole was spoken to by his supervisors for talking to other employees, something he had always done and had frequently been reprimanded for. The

General Counsel contends that the rule is violative in its inception and is further violative in that it was enforced in a discriminatory manner. I find nothing violative about the promulgation of the rule. It is clear that there had been a rule in effect, if not strictly enforced, requiring employees to be attentive to their work and Rogers' announcement was no more than a reiteration of it in contemplation of the union organizing campaign.

The General Counsel adduced evidence that antiunion employees including Ernestine Alfaro, Pat Cruz, Billie Ashworth and Julius Stewart all carried on conversations away from their work stations and in the presence of Supervisors Huey Fredieu in the first instance and Blackie Boutte in the second instance without comment from the supervisors. Indeed Respondent produced no evidence to the contrary other than the testimony of the supervisors that they recalled no such incident.

I find that Cole's discharge was discriminatory and violative of Section 8(a)(3) of the Act. Clearly he was a difficult employee, arrogant and outspoken on occasion and quick to defend what he conceived to be his rights. Equally clearly he was not discharged because of his low production or high breakage. This had been a continuing situation for all of the 5 years for which he worked for Respondent and obviously had not been sufficient to cause Respondent to discharge him until he evidenced interest in the union organizational movement. The sole occasion of his discharge was his conversation with other employees and his challenge to Foreman Richard that Richard was not a supervisor in the eyes of Respondent.

I find that although nonunion employees were permitted to circulate and converse without hindrance or reprimand from supervisors who had to be aware of their activities, similar activities on the part of Cole led to his immediate discharge within a few days of partner Victor Rogers' announcement that the rule would be enforced. A no-solicitation rule of this nature can remain valid only if it is enforced without discrimination. Here in the face of discriminatory enforcement the rule is rendered invalid and Cole's discharge for the breach thereof violates Section 8(a)(3) and (1) of the Act

The Discharge of Rejenia Cagle

Rejenia Cagle had been denied a raise because of poor production.[4] Miss Cagle was informed that if she improved her production she would be considered again for a raise; she worked hard and improved her production and the raise was not immediately forthcoming so she contacted Victor Rogers and complained that although she was doing her work she had not received the raise whereas other employees were not making sufficient production and had been given a

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3 The General Counsel moved to strike Respondent's Exh. No. 4 on the ground that a condition subsequent to its receipt i.e., perusal of the original record by the General Counsel was not fulfilled. In the light of the discussion above it appears that the Exhibit, an accumulation of production and breakage records of Aaron Cole, is immaterial to the issue of his discharge. Accordingly and for this reason the General Counsel's motion to withdraw my receipt of the Exhibit is granted.

4 It is noteworthy that although Aaron Cole was allegedly discharged for poor production going back over a period of 4 years there is no evidence that he was ever denied a raise because of that and indeed he had been given a raise within a few months of his discharge.

raise. Rogers intervened on her behalf and she was given a raise.

The day after Aaron Cole's discharge Victor Rogers held a meeting at which he made a speech to the employees stating among other things that Aaron Cole had been discharged because he was not doing his work. Rogers then addressed Miss Cagle during the meeting stating "isn't that right Miss Cagle," she did not reply. He again called for a reply and a third time and Miss Cagle said she had no comment. Cagle then asked Rogers why he was calling her name in a speech in front of all the other employees and Rogers explained that he had received a telephone call from her in which she asked why she had not received her raise. Cagle pointed out this was none of the others employees' business and he should not tell them about this matter in his speech. After Rogers concluded his speech Cagle confronted him in the employee lunchroom and demanded to know why he had embarrassed her. He told her that he had expected her to support him in what he was saying about Aaron Cole. She told him that she considered that what he was saying about Aaron Cole was a lie and an argument ensued in which she apparently told him that everything he said in his speech was a lie. She was immediately discharged. The General Counsel contends that the discharge of Cagle violated Section 8(a)(3) of the Act. The General Counsel argues only that in light of Respondent's history of antipathy toward the Union it is obvious that Cagle was discriminatorily terminated because of her union activity. It is obvious to me that she was terminated because she challenged the statements made by Rogers in his speech to the employees and offended him by letting him and apparently other employees know that she did not believe him. This is not a case as in *Prescott Industrial Products Company*,[5] or *Leece-Neville Company*,[6] in which employees interrupted an employer's antiunion meeting to debate assertions made by the Employer. The speech was not in the first place shown to be antiunion in character other than Rogers' self-serving declaration that Aaron Cole was discharged for cause. Miss Cagle's objection was to her being singled out and what she reasonably considered to be her personal business being aired before the employees by Rogers. I know of no law that requires an employer to extend to the employees the same level of gentility that the Employer attempts to exact from his employees. It is not an unfair labor practice for an employer to embarrass an employee before his fellow employees except with regard to the employee's union activities. There is no showing that Rogers' embarrassment of Rejenia Cagle on this occasion had anything to do with her union activities or his antiunion campaign. I find no violation implicit in this rather unpleasant episode and I shall recommend that the complaint be dismissed insofar as it is alleged to be a violation.

The Discharge of Marie Cash

Marie Cash was a strong union adherent. She was the first employee of Respondent to wear T-shirts distributed by the Union bearing in large letters the caption, VOTE UNION. She was seated in the lunchroom on June 13 during the morning coffeebreak wearing

5 205 NLRB No. 15.

6 159 NLRB No. 293.

her union T-shirt facing, at the next table, three employees, Beverly Deculus, Alice Horne and Gwendolyn Reeves. According to Miss Cash's testimony she saw Deculus look at her and heard her say "Why don't you send that damn Frenchman back to France," Cash replied "What about you, coon ass." Deculus left the room and Cash called after her "coon ass trash." Another employee, Nettie Stanford then told Cash as she was leaving the room that she objected to her using the term "coon ass trash" and did not want to hear her use it again because she, Nettie Stanford was a coon ass too.[7] According to the testimony of Deculus what Cash said was "you better shut your mouth, you damn coon ass." Horne and Reeves testified in exactly the same words as Deculus. Stanford who appears to have been the only neutral person in the party, other than having objection to the use of the word trash in connection with the expression coon ass, testified in agreement with Cash that that was the expression used. Although Deculus, Horne and Reeves all agreed in testifying that Cash said "you better shut your mouth," they also agreed that Deculus had said nothing. I do not credit them. I do credit Cash.

There is no question that Respondent had a strong policy against "ungentlemanly" and "unladylike" language in the plant. The policy was obviously designed to reduce to a minimum the possible bad feeling among employees. However, evidence adduced by the General Counsel reveals that in the past warnings

7 It appears that coon ass is a term used among the Cajuns in Louisiana from which each of these employees came. The term itself is not considered approbrious. Stanford testified that it was the addition of the word "trash" that made it approbrious because trash was like garbage, something that you threw away.

were given to employees and discharge was not the immediate outcome. For example Cash had in the recent past been called a bitch by another employee, identified only as Olive, and no steps had been taken against Olive. Another employee, Shirley Strother, testified that when a fellow employee, Sharon Watson, called her a "pimple faced bitch" Sharon Watson was not discharged but was warned and moved to a different part of the plant to separate her from Strother, she was neither suspended nor terminated.

Shortly after the incident in the lunchroom, Cash was called into Wiebusch's office where she explained what had happened. During the course of the meeting Stanford came into the office and repeated her indignation at the fact that Cash had used the expression "coon ass trash." Stanford told Wiebusch at this time that as she was descended from a Frenchman and she was herself a coon ass but objected to being called trash. Wiebusch asked Cash if she thought the term was dirty and Cash said that it was not, whereupon Wiebusch said he was going to suspend Cash. Cash asked Freddie Fredieu, her supervisor who was present why nothing had been done about Olive when she called Cash a bitch. Wiebusch intervened and told Cash that she was suspended to give her time to think about it and they would call her. Cash left the room crying, pausing at the door and said "don't bother." No one ever called her; Respondent contends that she quit.

It is clear that Cash was a strong union adherent and everybody knew it. It is equally clear that Beverly Deculus was strongly antiunion, indeed she and her two friends Reeves and Horne at the time of the con-

versation in the lunchroom were planning the purchase of the plastic straw hats which they proposed to wear with "Vote No" or "Support Rogers Brothers" signs on them. Respondent offers no explanation for the difference in its reaction to Cash's unladylike conduct and its reaction to the conduct of Olive and Sharon Watson. The only inference to be drawn therefore is that the difference in treatment resulted from the union status of Cash and Respondent's demonstrated antiunion animus. I conclude and find that Respondent's action in suspending Marie Cash was discriminatorily motivated and violated Section 8(a)(3) and (1) of the Act. Under the circumstances I do not believe that Respondent should be entitled to escape the consequences of its unlawful act by withholding further employment from Cash, who testified that she wants to go back to work for Respondent, because in her anger and dismay at her discriminatory suspension she told Respondent not to bother to call her. Accordingly, I shall recommend that Respondent offer her reinstatement with backpay.

The Handbilling Incidents

On two occasions within a week before the election, antiunion handbills were distributed at the door by an informally organized group of antiunion employees. Respondent's laboratory fronts on a main business street in Beaumont, Texas, and physically abuts the sidewalk. Pictures of the site reveal that a bus stop is located a few feet to the right of Respondent's building as one faces the door. It appears that on occasion handbills were being distributed both by prounion and the antiunion employees. During the distribution which took place at the noon hour, various members of

Respondent's supervisory force came out on the sidewalk and stood among the handbilling employees, either leaning against the building or standing around reading handbills and watching the proceedings. With one exception there is no evidence that any of the supervisors actually distributed any handbills. The one exception is found in the testimony of Aaron Cole that Supervisor Kennette handed him a handbill on one occasion as Cole was entering Respondent's laboratory.

A number of pictures were taken of the handbilling, they disclose the presence of various supervisors.[8]

There is no evidence that any of the supervisory employees had anything to do with drafting the handbills or having them printed, nor that they exercised any control, advisory or otherwise, over the employees who distributed them. The only color to the General Counsel's argument is that by their presence among the employees distributing the handbills, they

8 Respondent contends that its foremen are not supervisors arguing that the foremen have no authority independently to hire or fire or to grant raises. However the foremen have the actual day to day supervision of the employees working under them. They do not punch timeclocks, they attend supervisory meetings, they, together with the higher echelons of supervisors, were present at the meeting at which Respondent's counsel advised supervisors concerning their rights and duties during the organizing campaign and it is to them that the employees report in cases of absence, tardiness, etc. The foremen apparently do no production work, they assign employees and reassign them when the occasion arises, they warn and discipline employees and at least as far as the record herein shows their threats of disciplinary action are normally carried out. I find that they are supervisors within the meaning of the Act.

tacitly indicated their approval of the nonunion employees' activities.[9]

I find nothing in the evidence suggesting that the handbilling had a tendency to interfere with, restrain or coerce employees in the exercise of their protected rights. To the extent that the presence of the supervisors lent an aura of approval to the activities of the nonunion employees, this could scarcely have been a surprise to any viewer who had taken the time to read Victor Rogers' 11 page campaign letter which clearly disclosed Respondent's antiunion stature. I recommend that the complaint be dismissed insofar as it alleges that the supervisors "authorized, ratified, condoned and participated in the distribution" of the leaflets.

The General Counsel also alleges that the incident where Victor Rogers singled out Rejenia Cagle during his speech to the employees violated Section 8(a)(1). As I pointed out in my discussion of the discharge of Miss Cagle I find nothing in the incident that has a tendency to interfere with any employee rights. Similarly the General Counsel contends that immediately prior to the Board conducted election Victor Rogers addressed himself to the employee who was acting as observer for the Union and stated "don't you think you would be doing a better job making lenses than being here as an observer — well you do a good job." Again I find nothing coercive or calculated to interfere with, or restrain employees in Victor Rogers'

9 One of the pictures shows Foreman Foreman holding a white hat in front of his face. There is no identification of the white hat as being identical to those worn by the handbill distributing employees or containing any legend as did the others.

language, I recommend that these allegations of independent violations of Section 8(a)(1) be dismissed.

IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Conclusions of Law

1. Rogers Brothers Wholesalers is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union and its Local 4-243, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Aaron Cole and by suspending Marie Cash, Respondent discriminated with regard to the hire and tenure and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, thereby engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and by the same acts and conduct, interfered with, restrained and coerced its employees in the exercise of the rights

guaranteed them by Section 7 of the Act in violation of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent has discriminated with regard to the hire and tenure of Aaron Cole and Marie Cash, I shall recommend that Respondent offer them reinstatement to their former jobs, or if those jobs no longer exist to substantially equivalent jobs and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them by payment to them of sums of money equal to those which they normally would have earned from the date on which they were discriminated against until the date of the valid offer of reinstatement less net earnings during such period to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and with interest as described in *Isis Plumbing and Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record in this

proceeding and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

ORDER

The Respondent Rogers Brothers Wholesalers, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership and activities on behalf of Oil, Chemical and Atomic Workers International Union and its Local 4-243, AFL-CIO, or any other labor organization by discriminating in regard to the wages, hours and working conditions of their employees because of their activities on behalf of said labor organization.

(b) In any like or related manner interfering with, restraining or coercing their employees in the exercise of their rights to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or to refrain from any or all such activities.

2. Take the following affirmative action which is designed to effectuate the policies of the Act:

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10 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Offer to Aaron Cole and Marie Cash immediate and full reinstatement to their former jobs or if such jobs no longer exists to substantially equivalent jobs and make them whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its laboratory in Beaumont, Texas, copies of the attached notice marked "Appendix."[11] Copies of said notice on forms provided by the Regional Director for Region 23, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 23, in writing, within 10 days from the date of this Order what steps Respondent has taken to comply herewith.

11 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

With regard to those allegations in the complaint that I found no violation proven, I recommend that they be dismissed.

Dated at Washington, D.C.

/s/ PAUL E. WEIL
Paul E. Weil
Administrative Law Judge

APPENDIX

NOTICE TO
EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency Of The United States Government

After a trial at which all sides had the opportunity to present their evidence, an Administrative Law Judge of the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice and to keep our word about what we say in this notice.

The Act gives all employees these rights:

To engage in self-organization;
To form, join or help unions;
To bargain collectively through a representative of their own choosing;

To act together for collective bargaining or other mutual aid or protection; and

To refrain from any and all these things.

WE WILL NOT do anything that interferes with these rights.

More specifically,

WE WILL NOT discourage membership in Oil, Chemical and Atomic Workers International Union and its Local 4-423, AFL-CIO, or any other labor organization by discriminatorily discharging or suspending any employee because of his activities on behalf of said labor organization.

WE WILL reinstate Aaron, Cole and Marie Cash, to the jobs they formerly held or if these jobs no longer exist, to substantially equivalent jobs and WE WILL make them whole for any loss of pay they may have suffered as a result of our discrimination against them by payment to them of the amount of money they lost as a result of our action.

ROGERS BROTHERS
WHOLESALERS
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One Allen Center, 500 Dallas Avenue, Suite 920, Houston, Texas 77002. Telephone (713) 226-4296.

Beaumont, Texas

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

ROGERS BROTHERS WHOLESALERS

and Cases 23-CA-5143
23-CA-5143-2

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION AND ITS
LOCAL 4-243, AFL-CIO

ORDER CORRECTING DECISION AND ORDER

On June 2, 1975, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1]

1 218 NLRB No. 19.

IT IS HEREBY ORDERED that said Decision and Order be, and it hereby is, corrected by striking the phrase "and to keep our word about what we say in this notice" from the first paragraph of the "Appendix" and substituting therefor the following phrase: "and we intend to carry out the Order of the Board and abide by the following:"

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D.C., July 15, 1975.

By direction of the Board:

George A. Leet

Associate Executive Secretary

APPENDIX "B"

NATIONAL LABOR RELATIONS BOARD, Petitioner-Cross Respondent,

versus

ROGERS BROTHERS WHOLESALERS, Respondent-Cross Petitioner.

No. 75-2956
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

Jan. 22, 1976.

Application for Enforcement and Cross Application for Review of an Order of the National Labor Relations Board (Texas Case).

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

This case arises upon the petition of the National Labor Relations Board seeking enforcement of the

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* Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5th Cir. 1970, 431 F.2d 409, Part I.

decision and order of the Board, which, among other things,[1] ordered the reinstatement with back pay of two suspended employees of respondent. Respondent contends that there is no substantial evidence to support the findings and conclusions of the NLRB.[2]

The administrative law judge found, among other things, that respondent's discharge of Aaron Cole and its indefinite suspension of Marie Cash[3] were discriminatory and unfair labor practices within the meaning of § 8(a)(3)[4] of the National Labor Relations Act and interfered with § 7 rights of its employees, in violation of § 8(a)(1)[5] of the act. The law judge's order that Cole and Cash be reinstated with back pay and that respondent terminate its anti-union activities was adopted[6] by the Board.

1 The Board ordered respondent to cease and desist from discouraging union membership, discriminatorily enforcing its no-solicitation rule and from interfering with the right of self-organization in any manner. Certain policing measures were also ordered. The Board's order substantially adopted that entered earlier by the administrative law judge, except that it added the paragraph forbidding discriminatory enforcement.

2 Respondent devotes less than two pages of its 56 page brief to an assertion that the administrative law judge erred in overruling its motion to strike an order of consolidation and in allowing the complaint to be amended. This contention is based on reasoning that an earlier informal settlement for a consent election was, effectively, res judicata with respect to the Board's claims. This argument is devoid of merit; the unlawful activities here involved occurred after the settlement agreement.

3 The judge also concluded that the termination of one Rejenia Cagle was not violative of the act and dismissed the complaint as to this alleged violation. This dismissal has not been challenged by the NLRB.

4 29 U.S.C. § 158(a)(3).

5 *Id.* at (a)(1).

6 With a minor change not here relevant, see note 1, *supra*.

It is our conclusion that, although the evidence is in sharp conflict, this case involves credibility judgments that are best resolved by the trier of fact and the agency that possesses expertise in this area. Accordingly, since there is substantial evidence to support the findings, conclusions and order of the Board, and no other reasons having been shown to disestablish the validity of these actions, the order is due to be enforced. *See, e. g., Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc.*, 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447, 454-55 (1974); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 485-86, 71 S.Ct. 456, 463, 95 L.Ed. 456, 466-67 (1951); *NLRB v. Pearl Bookbinding Co.*, 517 F.2d 1108, 1112 (1st Cir. 1975); *NLRB v. R. L. Sweet Lumber Co.*, 515 F.2d 785, 793 (10th Cir. 1975). ~~Since respondent did not show any failure to~~ mitigate damages by either Cole or Cash, reinstatement with back pay, until the date of valid offers to reinstate less net earnings, was appropriate. *Compare J. H. Rutter Rex Manufacturing Co. v. NLRB*, 473 F.2d 223, 230-31, 241-42 (5th Cir.), *cert. denied*, 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55 (1973), *with NLRB v. Southern Greyhound Lines*, 426 F.2d 1299, 1303-04 (5th ~~Cir. 1970).~~

Enforced.

APPENDIX "C"

NATIONAL LABOR RELATIONS
BOARD, Petitioner-Cross
Respondent,

v.

ROGERS BROTHERS WHOLESALERS,
Respondent-Cross Petitioner.

No. 75-2956
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

March 29, 1976.

Applications for Enforcement of an Order of the National Labor Relations Board.

(Opinion January 22, 1976, 5th Cir. 1976, 526 F.2d 354)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

Upon consideration of the motion of petitioner-cross respondent for modification of the opinion rendered January 22, 1976, the following on page 1321 of the slip opinion [page 355 of 526 F.2d] is deleted:

> Since respondent did not show any failure to mitigate damages by either Cole or Cash, reinstatement with back pay, until the date of valid offers to reinstate less net earnings, was appropriate. *Compare J. H. Rutter Rex Manufacturing Co. v. NLRB*, 473 F.2d 223, 230-31, 241-42 (5th Cir.), *cert. denied*, 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55 (1973), *with NLRB v. Southern Greyhound Lines*, 425 F.2d 1299, 1303-04 (5th Cir. 1970).

* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

The issue addressed by that statement was not squarely before the court in this proceeding, which involved enforcement of the Board's order. The opinion in all other respects remains unchanged.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v. No. 75-2956

ROGERS BROTHERS WHOLESALERS,
Respondent.

JUDGMENT

Before: GEWIN, GOLDBERG and DYER, Circuit Judges.

THIS CAUSE was submitted upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Rogers Brothers Wholesalers, Beaumont, Texas, its officers, agents, successors, and assigns on June 2,

1975, as corrected, July 15, 1975 and upon a petition filed by the above-named Respondent to review the Board's said order, as corrected. The Court, having carefully considered the briefs and transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on January 22, 1976, handed down its decision granting enforcement of the Board's order, as corrected. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order, as corrected, of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, Rogers Brothers Wholesalers, Beaumont, Texas, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order, as corrected, contained.

ENTERED: FEB. 13, 1976

APPENDIX "E"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2956

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

ROGERS BROTHERS WHOLESALERS,
Respondent.

On Application for Enforcement of an Order of the
National Labor Relations Board

MOTION FOR REHEARING BY
ROGERS BROTHERS WHOLESALERS

ADAMS & BROWNE
GOODHUE BUILDING
BEAUMONT, TEXAS

BY: GILBERT T. ADAMS
ATTORNEYS FOR
RESPONDENT

INDEX OF SUBJECT MATTER

INDEX OF AUTHORITIES

TEXT

MOTION FOR REHEARING BY ROGERS BROTHERS WHOLESALERS

TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Within the time prescribed this motion for rehearing by Rogers Brothers Wholesalers is presented to the Court.

GROUNDS FOR REHEARING

1.

THIS HONORABLE COURT ERRED IN FINDING AND HOLDING THAT RESPONDENT'S DISCHARGE OF AARON COLE AND ITS SUSPENSION OF MARIE CASH WERE DISCRIMINATORY AND UNFAIR LABOR PRACTICES WITHIN THE MEANING OF SECTION 8(a) (3) OF THE ACT, AND INTERFERRED WITH SECTION 7, RIGHTS OF ITS EMPLOYEES IN VIOLATION OF SECTION 8(a) (1), OF THE ACT.

2.

THIS HONORABLE COURT ERRED IN AFFIRMING THE BOARD AND SUSTAINING THE ADMINISTRATIVE LAW JUDGE WEIL'S PERMISSION OVER OBJECTION, TO ALLOW GENERAL COUNSEL'S AMENDED COMPLAINT ADDING PARAGRAPHS 8, 9, 10, 11 and 12, ON THE DAY OF THE TRIAL, THUS PERMITTING THE GENERAL COUNSEL TO LITIGATE MATTERS WHICH HAD

BEEN SETTLED AND WHICH SETTLEMENT WAS APPROVED BY ADMINISTRATIVE LAW JUDGE JOHNSON AND WHICH JUDGE JOHNSON REFUSED TO SET ASIDE, AND THEREBY, THE ADMINISTRATIVE LAW JUDGE WEIL PERMITTED EVIDENCE OF PRE-SETTLEMENT ALLEGED WRONGDOINGS, WHICH JUDGE WEIL RULED WAS PERMITTED SOLELY TO SHOW ANIMUS. THEREBY DISREGARDING VALIDLY ENTERED AND AGREED TO PRIOR SETTLEMENT AGREEMENT ON THE VERY CHARGES EMBRACED IN THE AMENDMENT, WHICH IS A VIOLATION OF PUBLIC POLICY OF ENCOURAGING SETTLEMENTS.

STATEMENT AND ARGUMENT

DISCHARGE OF AARON COLE

This Court in its opinion stated: "It is our conclusion that, although the *evidence is in sharp conflict,* this case involves credibility judgments that are best resolved by the tryer of facts, and the agency that possesses expertise in this area. Accordingly, since there is substantial evidence to support the findings, conclusions and order of the Board, *and no other reasons having been shown to dis-establish the validity of these actions, the order is due to be enforced.*"

There may be "sharp conflict" as to the evidence regarding the items embraced in the settlement agreement, which was entered into long prior to the acts complained of in the charge presently before the Court, there is, for all practical purposes, no conflict in the evidence as to what was the occasion for the discharge of Cole and the suspension of Marie Cash.

The discharge of Aaron Cole was because he was, and persisted in being, and continuing in the conduct and attitude that the Law Judge found him guilty of and expressly so stated. Not only is the evidence on this question undisputed, but the Administrative Law Judge Weil found him guilty of it.

Judge Weil found, after hearing the employee Cole testify that:

> "Apparently, from the inception of his employment, Mr. Cole was an erratic employee. While he missed very few days of work, he was occasionally tardy, both in reporting to work in the mornings and after coffee breaks and luncheon breaks. His production was never completely satisfactory, and his breakage (of expensive eyewear) was high. (Parenthesis added.) In addition, Mr. Cole was talkative, flippant and occasionally argumentative, none of them qualities particularly prized by respondent's hierarchy."

Then the opinion by Judge Weil sets forth various conversations; particularly the one of March 11th, which occurred before the settlement agreement and was settled by the settlement agreement and then concludes on page 17a, lines 20-22 as follows:

> "I conclude and find that Cole was discharged because he was talking to employees during his work time."

There was a rule against talking during work time. As held by the Board long, long ago, "working time is for work." PEYTON PACKING COMPANY, 49 NLRB 828, 843 (1943), enforced, 142 F(2) 1009 (C.A. 5, 1944), Cert. denied, 323 U.S. 730.

There was a rule against talking during work time, which rule had been in force for a long time and recently reiterated and re-emphasized.

Judge Weil found, page 18a of his opinion, line 3 through 9, as follows:

> "I find nothing violative about the promulgation of the rule. It is clear there had been a rule in effect, if not strictly enforced, requiring employees to be attentive to their work and Rogers' announcement was no more than a reiteration of it in contemplation of the union's organizing campaign."

Therefore, to this point we have a finding that Cole was talking during work time in violation of the rule; so we then come to the question of whether or not this rule was discriminatorily enforced in violation of Section 8(a) (3) of the act.

Administrative Law Judge Weil found, page 18a of this opinion, line 23, that:

> "Clearly he was a difficult employee, arrogant and outspoken on occasions and quick to defend what he conceived to be his rights."

And then at line 32, page 18a, of Judge Weil's opinion he finds:

> "The sole occasion of his discharge was his conversation with other employees and his challenge to Richard Foreman that Richard was not a supervisor in the eyes of respondent."

After the above, then Law Judge Weil found, page 19a, line 1, as follows:

> "I find that although non-union employees were permitted to circulate and converse without hinderance or reprimand from supervisors, who had to be aware of their activities, similar activities on the part of Cole led to his immediate discharge within a few days of partner Victor Rogers' announcement that the rule would be enforced."

This is the crux of this case. WAS THERE ANY EVIDENCE OF DISCRIMINATORY ENFORCEMENT OF THE "NO TALKING" RULE?

Respondent, Rogers Brothers, urges this Court to carefully consider that the only evidence in this case of such alleged non-union employees being permitted to converse without hinderance or reprimand from supervisors is that evidence set forth by general counsel, page 4, of his brief, first paragraph beginning line 8, as follows:

> "Employees Billy Ashworth and Julia Stewart, both of whom were wearing 'non-union badges', discussed the union while standing less than 2 feet from supervisor Blackie Boutte (Tr. 312-313); and Ernestine Alfaro conversed with Pat Crews and gave her a badge while in the presence of supervisor Fredieu." (Tr. 307-308).

Bear in mind that the immediately above quoted portion of general counsel's brief is all of the evidence. Now, let us analyze this witness' testimony.

First, it is not shown that there is any evidence that supervisor Boutte was aware that Ashworth and Stewart even had any kind of conversation. General counsel's witness testified "I heard them mention something about the union, but I don't know exactly what they said. Tr. 312, L. 21-22. Supervisor Boutte testified, he "did not hear such conversation". Tr. 527, L. 21 to L. 1, p. 528. This occurred, if it did occur, in the shop where employees were working and machines running.

The fact that a witness testifies that she heard two other employees in conversation, is not proof that a supervisor heard any conversation or permitted a violation of the "No Talking" rule. General counsel's witness, herself, could not hear the conversation and the best she could come up with was that she heard just the one word "union" mentioned by these two employees.

Second, the other evidence that the general counsel referred to in that one paragraph of page 4, contending that the "no talking" rule was discriminatorily enforced is the incident when Ernestine Alfaro was supposed to have conversed with Pat Crews and is supposed to have given her a badge. The witness testified she *did not know* what was on the badge — she said in response to "Do you know what the badge had on it?" "No, I don't." Tr. 307, L. 20-21.

The supervisor Fredieu was two or three feet away. Tr. 308, L. 1-3. Fredieu testified, when asked if he recalled (what else can a witness testify about except what he recalls) such conversation, and he testified, "No, sir, not to my knowledge." Tr. 532, L. 18-23. Then, he was asked if either of the girls exchanged badges, he replied "No." Tr. 532, L. 25 to L. 1, Tr. 533.

At this point, the Law Judge was moved to strike the witnesses' testimony because "obviously, her statement was just an opinion and a conclusion, because she testified she did not know what was on the badge and therefore, she could not know what was on it." Tr. 309, L. 6-10.

The evidence was undisputed that each employee, as he or she reported for work had to pick up his or her name plate and affix it to clothing in a prominent place to wear during work hours. Tr. 408, L. 11-18.

The Law Judge in response to the motion to strike the testimony recited above, stated:

> "I won't exclude her testimony, counsel, but I will certainly consider that, the fact that she did not know what was on the badge. For all we know, it might have been a name tag, right?"

Tr. 308, L. 11-14.

Certainly, it might have been a name tag. The ladies might have erroneously picked up each others name tags that morning and after discovering the error exchanged the name badges. Or, it may have been some other kind of badge that they had because no one knows what was on the badge.

It is respectfully submitted that these two (2) instances, and they are the only instances, of an alleged discriminatory enforcement of the "No Talking" rule, cannot, and do not constitute any evidence that respondent discriminatorily enforced the "No Talking" rule.

The only evidence that respondent's supervisors were aware of either of these two isolated, momentary incidents is that they were "near by" in the shop of many employees and many operating machines.

Being nearby might be sufficient to raise a presumption that the supervisor heard the incident or saw it but this is not a irrebuttable presumption. This presumption, if it reaches that status in the law of evidence, was positively denied by each of the supervisors. This denial wipes out the presumption, and general counsel was obligated to come forward with probative evidence, and having failed to produce such probative evidence there is no basis for a finding of discriminatory enforcement of the "No Talking" rule by respondents or its supervisors.

The rule governing this question, is stated in MCCORMICK AND RAY ON EVIDENCE, Second Edi-

tion, Vol. 1, Sec. 53, page 62, in discussing the various views of the effect of presumptions, as follows:

> "However, the most widely accepted is the one advocated by Thayer — namely that when fact "A" is established the jury must find fact "B" unless the opponent introduces evidence from which a jury could reasonably find that "B" did not exist. Or to put it as most Courts do, the presumption places upon the party against whom it operates the burden of producing evidence sufficient to justify a finding of the non-existence of the presumed fact. This view was adopted by the American Law Institute in its Model Code of Evidence, and is the established rule in Texas. It has the distinct merit of being easily understood and easily applied during the trial of a case. Under this rule where the opponent produces sufficient evidence to justify a finding against the presumed fact, the presumption vanishes and the situation is the same as it would have been had no presumption been created."

Thus, in view of the facts that the alleged conversations, which, no one heard or was able to even give a gist of, occurred in the midst of numerous people and operating machines, the supervisors positively denied knowledge of, destroyed this presumption that respondent's supervisors permitted violation of the "No Talking" rule, and discriminatorily enforced it.

The general counsel and the Board simply do not have evidence of discriminatory enforcement of the "No Talking" rule, and since this alleged dis-

criminatory enforcement of the "No Talking" rule is the sole basis for the Board's enforcement order, the order should be overturned and should not be enforced and the discharge of Aaron Cole should be sustained.

Thus, there is no evidence to sustain the finding of discriminatory enforcement of the "No Talking" rule.

This Court has held in NATIONAL LABOR RELATIONS BOARD v RUSSELL MANUFACTURING CO., 191 F(2) 358 (Fifth Cir. 1951), and in reversing the National Labor Relations Board at page 539, lower left hand corner of the page ruled as follows:

> "An employee may resign, be discharged, be promoted, or refuse reinstatement, for any cause or no cause at all, *so long as* it is not for union activities. The Board has not shown that the discharge in this case was for such union activities. Its findings and conclusions thereon are based on suspicion, not on substantial facts and legal evidence."

Then, this Court in concluding its opinion on page 360, ruled as follows:

> "It is apparent that the Board refused to accept the positive, unimpeached and uncontradicted testimony of the employer as to the real reason for the demotions or resignations involved. Such sworn testimony cannot be arbitrarily disregarded on the assumption that he was lying."

Bearing in mind that Cole refused training for another position which was offered by the company, that he was late, that he had low production, high breakage in expensive eye wear, that he was foul mouthed, that according to his own testimony he was in for counseling nearly every other day, it is apparent that he was discharged because he should have been discharged. There is a limit on how long an employer should attempt to bring around a recalcitrant, foul mouthed, low production, high breakage employee who refuses retraining and respondents had simply come to the end of their rope.

Even the Good Book says God will not always wrestle with a man's soul.

This Court also in NATIONAL LABOR RELATIONS BOARD v BIRMINGHAM PUBLISHING COMPANY, 262 F(2) 2, at page 8, (Fifth Cir., 1959) headnotes 9 and 10 passed on a very similar situation and reversed the holding of the Board.

This Court is not a Court to rubber stamp the Board's findings, but to search out and determine whether there is substantial evidence, and in this case there is no substantial evidence; as a matter of fact, there is no evidence and the instances given by the general counsel do not constitute evidence of discriminatory enforcement of the "No Talking" rule.

SUSPENSION OF MARIE CASH

Again, adverting to the Court's statement that the evidence is in sharp conflict we refer to Marie Cash's situation. There is practically no dispute as to what

happened. Marie Cash testified that she called the other employee a coon-ass. The record shows and respondent's brief beginning page 37 sets forth the detailed testimony of the conversation among the girls and the first person to speak was Marie Cash who referred to another girl at another table as a coon-ass. Other employees testified, employees who were no way involved, that when the witness Deculus who was referred to as a coon-ass left the room, Marie Cash called out, "Go tell, you bitch".

Cash admitted she called Deculus "coon-ass trash" Tr. 255, L. 20 to L 4, p. 256, Tr. 257, L. 20.

The testimony is clear that one of the employees was in tears and remonstrating with another and it was about to reach a hair-pulling and face slapping stage and something had to be done. The supervisor called them in, talked to them about it. Cash admitted that she had used this unbecoming and unladylike language in violation of the printed rules of the company. In order to keep the employees from coming to blows, and to calm down the situation, the supervisor told Marie Cash that he would have to investigate it and in the meanwhile suspend her and would call her. Thereupon, she arose, turned on her heels and said "Don't bother".

Obviously, Cash meant when she said "Don't bother" not to bother to call her, that she was not interested in hearing from him.

The Administrative Law Judge Weil seems to want to excuse and pass off this statement by Miss Cash,

"Don't bother" as having been made because she was upset.

Cash was not upset the next day, nor the next, nor the next week, nor the next several weeks to the extent that she could not pick up the telephone and call and inquire as to whether or not the investigation had been complete and whether she was to return. She took time off to go to Houston from Beaumont, Texas, to file a charge. She could have called the office.

Cash's sworn testimony is shown, transcript 268, line 1, through line 13, where she testified that she had no word with Deculus prior to the calling of Deculus a coon-ass trash. See Respondent's Brief pages 44 and 45.

If Cash would amend her language a little bit and not voluntarily without provocation call other employees sitting at another table a "coon-ass trash" the difficulty would have never arisen. Her act was in direct violation of the rules of conduct set forth in the printed rule book referred to in the briefs and whatever occurred was brought about by her own conduct, and she certainly is not entitled to reinstatement with back pay when all she had to do was to call and inquire whether or not she had been suspended or make a simple apology and say I would like to know what the situation is, can I come back to work? Just anything.

It is respectfully submitted that Marie Cash brought about the situation about which she now complains and now wants to make the employer pay for a couple of years of work while she laid off, seeking and hoping

for unearned income, while too indifferent to make inquiry as to whether she could be reinstated.

It is respectfully submitted that the Board's order should not be enforced and Marie Cash should not be ordered back to work with back pay.

DISREGARD OF PRE-SETTLEMENT AGREEMENT

At the beginning of the trial before Judge Weil, general counsel asked to amend his complaint by adding paragraphs 8, 9, 10, 11 and 12 to litigate matters settled by the pre-settlement agreement.

This same request had been made of Judge Johnson who heard the pre-settlement agreement and approved it, and ordered it entered, it was carried out satisfactorily and when he was asked to permit the amendment by the addition of said paragraphs, he refused. Yet Judge Weil having been assigned to the case allowed the amendment and then allowed volumes of evidence regarding the pre-settlement agreement. This is not only highly prejudicial but it was unfair and permitted the litigation of matters that were not to be litigated until Judge Weil permitted it *on the day of trial.*

Either the pre-settlement agreement was worth the paper it was written on or it was not worth the paper it was written on. As a matter of fact, the whole controversy here results from permitting the pre-settlement agreement to be disregarded and these various paragraphs added and volumes of testimony

permitted. It has clouded the entire issue and has prevented a clear concept of the complete inadequacy of any evidence showing any violations in this case.

It is the testimony regarding the activities closed by the pre-settlement agreement and it is those activities that are supposed to be the basis for showing company animus.

First, it was unfair to permit on the day of trial adding paragraphs of allegations that Judge Johnson had refused to permit and which had been settled by the pre-settlement agreement and next it has brought about confusion and difficulty in analysis of the testimony and extended the testimony by several volumes, and fails to uphold the settlement agreement and for all practical purposes discourages settlement agreements because if they are going to be permitted on the day of trial, as in this case, the employer will, of necessity, have to refuse to enter into any pre-settlement agreements knowing that he will be clubbed on the day of trial and he just as well litigate everything.

This is bad public policy and bad Law and it should be denounced in this case and respondents so pray the Court.

CONCLUSION

IN CONCLUSION, respondent respectfully prays the Court to grant this motion for rehearing and refuse to order the enforcement of the Board's award, for either Aaron Cole or Marie Cash and in the alternative,

that these employees be denied any back pay, just because of simple justice that they brought about by their recalcitrant conduct, the very circumstances about which they now complain, and for such other and further relief to which respondent may be justly entitled, either in law or equity, special or general.

Respectfully submitted,

ADAMS & BROWNE

GILBERT T. ADAMS
GOODHUE BUILDING
BEAUMONT, TEXAS

ATTORNEYS FOR
RESPONDENTS

CERTIFICATE

Respondent certifies that twenty five (25) copies of this brief are this day mailed by regular mail to the Clerk of the United States, Circuit Court of Appeals, Room 102, 600 Camp Street, New Orleans, Louisiana, 70130, and two (2) copies thereof have been mailed to Acting General Counsel, ATTENTION: Alan D. Cirker and Jane P. Schlaifer, National Labor Relations Board, Washington, D.C., 20570, and one (1) copy to the Honorable Louis V. Baldovin, Director, Region 23, N.L.R.B., Dallas-Brazos Building, 4th Floor, 1125 Brazos Street, Dallas, Texas, and a copy has been furnished the Oil, Chemical & Atomic Workers Union, and its Local 4-243, 2490 South 11th Street, Beaumont, Texas, 77701, ATTENTION: Mr. Ray West, all having

been mailed on this the 24th day of February, A.D., 1976.

GILBERT T. ADAMS

APPENDIX "F"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

OFFICE OF THE CLERK

March 15, 1976

TO ALL COUNSEL OF RECORD

No. 75-2956 — N.L.R.B. v. Rogers Brothers Wholesalers

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk
/s/ SUSAN M. GRAVOIS
Deputy Clerk

/smg
cc: Mr. Elliott Moore
Mr. Gilbert T. Adams

APPENDIX "G"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

OFFICE OF THE CLERK

March 30, 1976

Messrs. Gilbert T. Adams,
Raymond M. Brassard
Attorneys at Law
1021 Goodhue Bldg., Suite 1012
Beaumont, TX 77704

No. 75-2956 — N.L.R.B. v. Rogers Brothers Wholesalers

MANDATE STAYED TO AND INCLUDING
April 29, 1976

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinions, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,
EDWARD W. WADSWORTH
Clerk
/s/ MARY BETH BREAUX
Deputy Clerk

enc.
cc: Mr. Elliott Moore
Mr. Alan Cirker
Mr. Louis V. Baldovin, Jr.
Ms. Jane Schlaifer
Mr. C. M. Bradford